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No. 80-1582

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY R. MACDONALD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. This case presents the important legal question whether the Speedy Trial Clause of the Sixth Amendment applies to a period when a person is not under arrest or formally accused of a crime.[1] Respondent's contention (Br. in Opp. 10-12) that the speedy trial right runs uninterrupted from the time of an arrest ignores this Court's established rule that it is "the actual restraints imposed by arrest and holding to answer a criminal charge" that engage the protections of the Speedy Trial Clause. *United States* v. *Marion*, 404 U.S. 307, 320 (1971). The dismissal of the charges against respondent thus makes this case quite different from *Dillingham* v. *United States*, 423 U.S. 64 (1975), where the

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[1]Because this is purely a legal question, we will not take issue with respondent's statement of facts except to note that we consider some of respondent's assertions to be misleading.

defendant had charges pending against him for 22 months between his arrest and his indictment, and *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967), where the defendant had been discharged from custody but the indictment against him remained outstanding and he could be brought to trial at any time at the whim of the prosecutor.[2] Respondent asserts (Br. in Opp. 11), however, that the anxiety to which he was subjected because of the government's continuing investigation after the charges were dismissed requires the application of the Sixth Amendment. But this is not materially different from the contention that was rejected by this Court in *Marion, supra*, 404 U.S. at 321-322. The Court there explicitly recognized that a defendant may be prejudiced by investigative delay, but it held the Sixth Amendment inapplicable in that context because the situation of such a defendant "does not compare with that of a defendant who has been arrested and held to answer." 404 U.S. at 321. Rather, the Fifth Amendment guarantee of due process and statutes of limitations are the legal protections against investigative delay. 404 U.S. at 322-325.

The unprecedented decision below clearly merits review by this Court. First, it creates a conflict with several other courts of appeals, which was recognized by the dissenters on petition for rehearing en banc (Pet. App. 34a-39a).[3] More

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[2]Assuming that the preferral of military charges against respondent triggered the protections of the Sixth Amendment, respondent's situation *prior* to the dismissal of those charges can be analogized to that of the defendant in *Dillingham*, and accordingly the government has already noted that the Speedy Trial Clause does apply to the May 1970-October 1970 period when the military charges against respondent were pending. See Pet. 19-20 nn.11-12.

[3]The two cases relied on by respondent (Br. in Opp. 13-15) do not eliminate this conflict. In *United States* v. *Roberts*, 548 F. 2d 665 (6th Cir.), cert. denied, 431 U.S. 920 (1977), the court summarily rejected a speedy trial claim on the ground that no prejudice had been shown by the delay between arrest and indictment. The case thus cannot reasonably be read to hold that pre-indictment delay after the original charges

importantly, it is clear that an expeditious resolution of the question presented in this case is necessary for the sound administration of the criminal justice system (see Pet. 17-18). Prosecutors frequently decide to dismiss charges after a suspect has been arrested in order to await the development of further evidence or for other legitimate reasons. If the decision of the court below is correct, and the Speedy Trial Clause applies to such defendants while the investigation is continuing, it is important that law enforcement officials be authoritatively apprised of this rule so that they can properly allocate their resources.

2. Respondent also contends at length (Br. in Opp. 15-22) that the pre-indictment delay here violated his right to due process. As we noted in our petition (Pet. 19-22), we agree with the dissents and the district court below (Pet. App. 23a-27a, 45a-46a, 55a) that respondent has not demonstrated either a Fifth Amendment or Sixth Amendment violation because there is no showing that the period of delay impaired his defense in any way. Indeed, even the panel majority, which found a Sixth Amendment violation because it ruled that the possibility could not be excluded that delay was the cause of witness Stoeckley's loss of memory on the stand (Pet. App. 13a-14a), recognized that respondent had not shown actual prejudice (*id.* at 11a). In addition, respondent has not alleged the sort of fundamentally unfair government conduct, such as seeking a tactical

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have been dropped could support a dismissal on speedy trial grounds an issue that was not mentioned in the opinion. In *United States* v. *Lara*, 520 F. 2d 460, 464 (D.C. Cir. 1975), the court cited *United States* v. *Bishton*, 463 F. 2d 887 (D.C. Cir. 1972), with approval but ordered the indictment dismissed because the delay was deliberately caused by the government to gain an advantage. Cf. *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977); *United States* v. *Marion*, *supra*, 404 U.S. at 324.

advantage, that is a prerequisite to a Fifth Amendment violation. See *United States* v. *Lovasco*, 431 U.S. 783, 795 (1977).

The underlying theme of respondent's contention here is that he is innocent of the crimes charged and that his innocence is demonstrated by certain statements made by Helena Stoeckley both before and after trial (see Br. in Opp. 6-7, 17-19, 21-22). Because Stoeckley's trial testimony did not exonerate him, respondent contends that the delay requires that the indictment be dismissed. We disagree with the premise of this contention. The statements made by Stoeckley and her possible involvement in the crimes were fully investigated by the government prior to trial.[4] In addition, her recent statements cited by respondent (Br. in Opp, 21 n.*, 38A-40A) have been examined by the government, and it is the government's view that they fail to establish a reasonable doubt about the correctness of the jury's verdict. In any case, the "new evidence" in the form of post-trial statements procured by respondent from Stoeckley has no place in the consideration by this Court of the petition for a writ of certiorari. The proper forum for consideration of the significance of these statements is the district court, in consideration of a new trial motion under Fed. R. Crim. P. 33, should respondent elect to file one.[5]

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[4]Stoeckley's statements were characterized by Judge Bryan as "vague, fragmented and contradictory" (Pet. App. 26a). Although she made statements that indicated her belief that she was present at the scene of the crime, she also made contemporaneous statements that she was not present and that she did not know whether she was present or not. See C.A. App. 1188, 1211, 1228, 1251.

[5]Parenthetically, we note that these statements provide additional evidence from Stoeckley herself undercutting the court of appeals' suggestion that her failure to testify at respondent's trial as to her whereabouts at the time of the murders could properly be attributed to the delay in bringing the case to trial (Br. in Opp. 39A; see also Pet. App. 26a-27a).

Respondent also contends (Br. in Opp. 7, 17-19 n.* *, 20 & n.*, 21-22) that the district court erred in refusing to admit under Fed. R. Evid. 804(b)(3) certain testimony by third parties concerning statements made to them by Stoeckley. In our view, the district court acted correctly in declining to admit these statements; the basis for its conclusion that "corroborating circumstances [did not] clearly indicate the trustworthiness of the statement[s]" is explained at Pet. App. 56a-63a. In any event, this issue was not passed on by the court of appeals and is not before this Court. Moreover, even if respondent's contention is correct, the remedy for the asserted error would not be dismissal of the indictment.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

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